

**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

CAROLYN BLACKMON,

Plaintiff,

V.

NEW ALBERTSON'S INC., *et al.*,

## Defendants.

Case No. 2:10-CV-00712-KJD-PAL

## **ORDER**

Presently before the Court is Plaintiff's Motion for Relief from Judgment (#43). Defendant New Albertsons, Inc. filed a response in opposition (#44).

## I. Procedural History and Background

On October 17, 2011, the Court granted (#41) Defendant's Motion for Summary Judgment. The Court found that even construing the facts in a light most favorable to Plaintiff no question of material fact prevented the Court from granting judgment to Defendants. At deposition, each of Plaintiff's treating physicians testified as follows: (1) John Baldauf, M.D., testified that to a reasonable degree of medical probability, Plaintiff's right shoulder injury was and is not related to the fall alleged in her complaint, and that any referrals for physical therapy or other treatment would not be related to the fall; (2) Troy Watson, M.D., testified to a reasonable degree of medical probability that he could not relate the treatment of Plaintiff's left knee to the incident alleged in Plaintiff's complaint; and (3) Godwin Maduka, M.D., testified that Plaintiff received essentially the same type of treatment to her neck after the incident alleged in her complaint as she did prior to the

1 incident, due to a chronic condition, and that he did not know whether the incident changed or could  
 2 have changed her treatment and that Plaintiff was a candidate for surgery prior to her fall at  
 3 Albertson's.

4 Judgment (#42) was entered against Plaintiff on October 18, 2011. Twenty-four (24) days  
 5 later on November 11, 2011, Plaintiff filed the present motion for reconsideration. Moving for  
 6 reconsideration under Federal Rule of Civil Procedure ("Rule") 60, Plaintiff asserts that: (1) the  
 7 Court did not construe the evidence in favor of the non-movant, Plaintiff, and improperly weighed  
 8 the evidence; and (2) that another doctor, Dr. Forage, had opined that 20% of her need for surgery  
 9 may be due to the fall, but Plaintiff had not provided that testimony to the Court in opposition to the  
 10 motion for summary judgment.

11 II. Standard for Reconsideration

12 A motion to reconsider a final appealable order is appropriately brought under either Rule  
 13 59(e) or Rule 60 (b) of the Federal Rules of Civil Procedure. See United States v. Martin, 226 F.3d  
 14 1042, 1048 n.8 (9th Cir. 2000). Motions for reconsideration are committed to the discretion of the  
 15 trial court. See School Dist. No. 1J. Multnomah County v. ACandS, Inc., 5 F.3d 1255, 1262 (9th  
 16 Cir. 1993). Where reconsideration of a non-final order is sought, the court has inherent jurisdiction  
 17 to modify, alter or revoke it. See United States v. Martin, 226 F.3d 1042, 1049 (9th Cir. 2000);  
 18 Glavor v. Shearson Lehman Hutton, Inc., 879 F. Supp. 1028, 1032 (N.D. Cal. 1994) ("District courts  
 19 are authorized to reconsider interlocutory orders at any time prior to final judgment.").

20 A Rule 59(e) motion must be filed no later than twenty-eight (28) days following entry of the  
 21 final judgment. See Fed. R. Civ. P. 59(e). A motion for reconsideration is treated as a Rule 59(e)  
 22 motion if it is timely filed within the specified twenty-eight-day period. See Am. Ironworkers &  
 23 Erectors Inc. v. N. Am. Constr. Corp., 248 F.3d 892, 899 (9th Cir. 2001).<sup>1</sup> Otherwise, the motion is  
 24 treated as a Rule 60(b) motion for relief from judgment or order. See id.

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 26 <sup>1</sup> In 2009, Rule 59 (e) was amended to change the time for filing a Rule 59 (e) motion from ten to twenty-eight  
 days.

1       Reconsideration under Rule 59(e) is appropriate where: (1) the district court is presented with  
 2 newly discovered evidence or committed clear error; (2) the initial decision was manifestly unjust; or  
 3 (3) there is an intervening change in controlling law. See School Dist. No. 1J, 5 F.3d at 1263.  
 4 Motions made under Rule 59(e) “should not be granted absent highly unusual circumstances.” 389  
 5 Orange St. Partners, 179 F.3d at 665.

6       Pursuant to Rule 60(b), reconsideration is appropriate only upon a showing of: (1) mistake,  
 7 inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) an adverse party’s  
 8 fraud, misrepresentation, or other misconduct; (4) a void judgment; (5) a satisfied, released or  
 9 discharged judgment; or (6) any other reason justifying relief from the operation of the judgment.  
 10 See Fed. R. Civ. P. 60(b). A party can obtain relief under Rule 60(b) only upon an adequate showing  
 11 of exceptional or extraordinary circumstances. See Maraziti v. Thorpe, 52 F.3d 252, 254 (9th Cir.  
 12 1995). A Rule 60(b) motion must be filed within a reasonable time, and for reasons (1), (2) and (3)  
 13 not more than one year after the judgment, order, or proceeding was entered. See Fed. R. Civ. P.  
 14 60(b). Errors of law are cognizable under Rule 60(b)(1). See Kingvision Pay-Per-View Ltd. v. Lake  
 15 Alice Bar, 168 F.3d 347, 350 (9th Cir. 1999). Also, Rule 60(b) allows a district court judge to vacate  
 16 a judgment on its own motion if after “mature judgment and re-reading the record he [is]  
 17 apprehensive that he had made a mistake.” Id. at 352. However, due process requires the court to  
 18 give notice and an opportunity to be heard before vacating a judgment on its own motion. See id.

19       A motion for reconsideration should not merely present arguments previously raised; that is, a  
 20 motion for reconsideration is not a vehicle permitting the unsuccessful party to reiterate arguments  
 21 previously presented. See Maraziti, 52 F.3d at 255; Beentjes v. Placer County Air Pollution Control  
 22 District, 254 F.Supp.2d 1159, at 1161 (E.D. Cal. 2003); Khan v. Fasano, 194 F. Supp. 2d 1134, 1136  
 23 (S.D. Cal. 2001) (“A party cannot have relief under this rule merely because he or she is unhappy  
 24 with the judgment.”). “As a general rule, the Court does not consider evidence on a motion for  
 25 reconsideration if the evidence could have been provided before the decision was rendered initially.”  
 26 Arizona Civil Liberties Union v. Dunham, 112 F. Supp. 2d 927, 935 (D. Ariz. 2000) (citing School

1 Dist. No. 1J., 5 F.3d at 1263). In order for a party to demonstrate clear error, the moving party's  
 2 arguments cannot be the same as those made earlier. See Glavor, 879 F. Supp. at 1033. If a party  
 3 simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived. See id.  
 4 It is not an abuse of discretion for a district court to decline to address an issue raised for the first  
 5 time in a motion for reconsideration. See 389 Orange Street Partners, 178 F.3d at 665.

6 In order to meet the "newly discovered evidence" requirement within the meaning of Rules  
 7 60(b)(2) and 59, parties must show the evidence: "(1) is truly-newly discovered; (2) could not have  
 8 been discovered through due diligence; and (3) is of such a material and controlling nature that it  
 9 demands a probable change in the outcome." United States v. Westlands Water Dist., 134 F. Supp.  
 10 2d 1111, 1130 n.45 (E.D. Cal. 2001); see also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.,  
 11 833 F.2d 208, 211 (9th Cir. 1987). Failure to file documents in an original motion or opposition  
 12 does not turn the late-filed documents into newly discovered evidence. See School Dist. No. 1J., 5  
 13 F.3d at 1263. Under both Rules 59 and 60, if the evidence was in the possession of the party before  
 14 the judgment was rendered it is not newly discovered. See Coastal Transfer, 833 F.2d at 212.  
 15 Moreover, fact of possession makes clear the party did not use due diligence to discover it. Id.

16 III. Analysis

17 Plaintiff moved for reconsideration under Rule 60 (b)(1,6). Plaintiff does not specify what  
 18 specific mistake, inadvertence, surprise or excusable neglect justifies setting aside the prior order and  
 19 judgment. Essentially, Plaintiff asserts that the Court erred by failing to construe the evidence in a  
 20 light most favorable to the non-movant, Plaintiff. However, the Court did construe the available  
 21 evidence in a light most favorable to Plaintiff, but found that it was not enough to raise genuine  
 22 issues of material fact preventing summary judgment. Nevada law requires an expert opinion to  
 23 establish a causal connection between the incident and the injury. Grover C. Dils Med. Ctr. v.  
 24 Menditto, 112 P.3d 1093, 1100 (Nev. 2005). Further, that expert opinion must conform to the  
 25 reasonable degree of medical probability standard. See Moriscato v. Sav-On Drug Stores, Inc., 121  
 26 Nev. 153, 158 (Nev. 2005). Plaintiff failed to provide this standard of proof.

1 Now, Plaintiff tries to supplement the record by adding the testimony of another doctor that  
2 she failed to cite in opposition to the motion for summary judgment. However, even if the Court  
3 construes the untimely evidence in a light most favorable to Plaintiff, it does not aid her claim. Dr.  
4 Forage did not appear to testify as to a reasonable degree of medical probability. Instead, Dr. Forage  
5 testified “ . . . some of her condition may have been caused by the exacerbation [of a pre-existing  
6 condition] by the fall.” Thus, the Court denies Plaintiff’s motion for reconsideration because the  
7 evidence was available to Plaintiff but she failed to show good cause for her failure to file it with her  
8 opposition to the motion for summary. Additionally, even if the Court considered the Dr. Forage’s  
9 statement, it did not meet the standard required under Nevada law.

10 Finally, even if Plaintiff had moved for reconsideration under Rule 59(e), the Court would  
11 deny the motion because Plaintiff neither presented newly discovered evidence nor showed that the  
12 Court committed clear error.

13 **IV. Conclusion**

14 Accordingly, IT IS HEREBY ORDERED that Plaintiff’s Motion for Relief from Judgment  
15 (#43) is **DENIED**.

16 DATED this 21<sup>ST</sup> day of August 2012.

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Kent J. Dawson  
22 United States District Judge  
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